LIBRARY
SUPREME COURT, U. S.

No. 1067

Supreme Court, U.S.
FILED
MAY 26 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, ET AL.,

Petitioners

and

NATIONAL LABOR RELATIONS BOARD,

v.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND LOCAL 1441 IN OPPOSITION.

S. G. LITTMAN
TIM L. BORNSTEIN
1741 DeSales Street, N.W.
Washington, D. C. 20036
ROBERT KARMEL
33 North LaSalle Street
Chicago, Illinois
Attorneys for Respondents Retail Clerks International Association, AFL-CIO, and Local 1441, Retail Clerks International Association, AFL-CIO

INDEX

Question Presented 1

Statement 2

Argument 6

Conclusion 8

TABLE OF CASES

American Construction Co. v. Jacksonville, T. & K. R. Co., 148 U.S. 372 6

NLRB v. Indiana & Michigan Electric Co., 318 U.S. 9 7

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 6

STATUTES

National Labor Relations Act, as amended, 1947, 61 Stat. 151, 29 U.S.C. Section 151 *et seq.*

Section 7 4

Section 8(a) 1, 3, 5, 7

Section 8(b) 1, 3, 5, 7

Section 10(e) 7

Section 10(f) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1067

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, ET AL.,

Petitioners

and

NATIONAL LABOR RELATIONS BOARD,

v.

LOCAL 1441, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, and RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, AND LOCAL 1441 IN OPPOSITION.

Question Presented

Whether it is an unfair labor practice under Sections 8(a)(1), (2) and (3) and 8(b)(1)(a) and (2) of the National Labor Relations Act, as amended, for an employer to conspire with a union to employ its organizers to "organize" employees where, in addition to the conspiracy itself, the following overt acts occur:

1) The undercover organizers are actually hired;

2) They organize the employees in the manner agreed upon and without interference from the employer;

3) The employer accords hasty recognition to the union upon request and then executes a complete collective bargaining contract on the day after the union is recognized.

Statement

On August 1, 1961, Charles Briehof, General Manager and Labor Relations Director of a chain of fourteen "Miracle Mart" discount department stores, was in Muncie, Indiana, to open a new store (J.A. 24, 27-29). There he met with Max Ungar, an official of the Amalgamated Clothing Workers of America (hereafter, "Amalgamated") (J.A. 30). According to Briehof's uncontradicted testimony, Ungar made the following request of him (J.A. 30-31):

> A. He requested that I hire organizers, three women in fact, that he would send down and they were experienced discount girls and assured me that they would do a quiet, efficient job of organizing the store.[1]

Briehof agreed to Ungar's scheme to assist Amalgamated by this secretive method (J.A. 31). The first of the three covert organizers, a Mrs. Howard, was to report to work the next day (J.A. 31), and the other two organizers, named Ice and Denham, were to report a week later (J.A. 31-33).

On August 2, Mrs. Howard was hired at the store. On August 7, Ice and Denham—officers of Amalgamated from

[1] Briehof's testimony was uncontradicted. For reasons known best to it, Amalgamated did not call Ungar to testify even though Ungar was the only person who could have contradicted Briehof's confession of the details of the conspiracy.

Louisville, Kentucky—appeared at the Muncie store (J.A. 84-85), and, in accordance with the Ungar-Briehof conspiracy, they reported directly to Briehof, who sent them to store manager LaVictor. LaVictor was then in the process of hiring new employees, and he hired them on the spot as sales clerks (J.A. 33, 57, 58).

During the ensuing week, while masquerading as bona fide "employees," Amalgamated's undercover organizers obtained a number of collective bargaining authorization cards from unsuspecting employees (J.A. 70-73). At the same time the employer maintained a "no solicitation" rule which resulted in denial to the Retail Clerks Union of any access to the employees in the store (J.A. 34-35).

On August 15, Amalgamated asked the employer for exclusive recognition as bargaining agent for the employees of its Muncie store (J.A. 36). The employer agreed to conduct a check of Amalgamated's authorization cards on that very day. Based on Amalgamated's majority status obtained through the efforts of Howard, Ice and Denham, the employer conferred on Amalgamated recognition as exclusive bargaining agent for all of its employees (J.A. 34-38).

On the next day, the original conspirators—Ungar and Briehof—met in Cleveland, Ohio, where they agreed upon and executed a collective bargaining agreement governing every phase of the working conditions of the employees in the Muncie store (J.A. 404). Their haste in conducting the card check and in executing this contract was for the admitted purpose of binding the employees to an Amalgamated contract before the Retail Clerks Union could organize them (J.A. 65, 67).

The Retail Clerks filed unfair labor practice charges under Sections 8(a)(1), (2), and (3), and 8(b)(1) and (2),

against Amalgamated and the employer, and a formal complaint was issued by the N.L.R.B.'s Regional Director.

After a full hearing an N.L.R.B. Trial Examiner sustained the allegations of the complaint that the Amalgamated and the employer had violated the Act. His crucial finding was this (J.A. 174-175):

> "... [The] facts established by the undisputed testimony of Charles Brielfof, former General Manager of the chain of stores, depict the unsavory spectacle of collusion between an employer . . . and [the Amalgamated] to deprive employees of their rights, guaranteed by Section 7 of the Act. . . .
>
> Such collusion consisted of an oral agreement between Brielfof and an Amalgamated representative, even before the Muncie store opened, whereby Amalgamated organizers would be hired as employees for the specific purpose of soliciting regular employees to join that labor organization. The agreement was fulfilled and . . . resulted in an exclusive-recognition contract between management and the Amalgamated.

By a vote of two to one,[2] a panel of the National Labor Relations Board reversed its Trial Examiner and dismissed the complaint on the sole ground that—assuming there was a conspiracy—the three covert organizers had been formally hired by store manager LaVictor and the record did not show whether LaVictor knew of the conspiracy entered into by Brielfof, his superior (J.A. 191). In other words, the Board held that no unfair labor practice had been committed because there was no proof that the technical act of hiring of three covert organizers by store manager LaVictor was itself "pursuant to" the conspiracy (J.A. 191).

Initially the Board ruled that LaVictor had hired the three organizers only because they were "experienced" dis-

[2] Member Leedom dissented on grounds not here relevant. He did not pass on the substantive questions reached by the other two members (J.A. 194-195).

count girls'" (J.A. 191). The Board quickly deleted this finding, however, upon reconsideration (J.A. 205), for their "experience" was not even the subject of an inquiry when they were hired (J.A. 198-199).

On the Retail Clerks' petition for review under § 10(f) of the Labor Act, the Court of Appeals for the District of Columbia Circuit reversed and remanded *per curiam*. Rejecting the Board's legal conclusion, the court below said (Pet. App. A, pp. 23-24):

> The proof does show . . . that the acts alleged to have been agreed upon in the conspiracy did occur. The three organizers of Amalgamated did appear; they were hired by LaVictor; they did organize the Miracle Mart; and a contract was signed by Miracle Mart and Amalgamated.
>
> We think that if the conspiracy between management and Amalgamated to organize the Muncie store existed, further proof of its effectiveness is not required to establish violations of Sections 8(a)(1), (2), and (3), and 8(b)(1)(A). Such a conspiracy would inevitably, in some degree at least, "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," and "interfere with the formation or administration of any labor organization." 29 U.S.C. § 158(a)(1) and (2). See also 29 U.S.C. § 158(a)(3).

As the Board had merely "assumed" the existence of the conspiracy for purposes of its decision, the Court of Appeals remanded the case to the Board to take the additional testimony of Ungar and LaVictor[3] on the question of whether the conspiracy existed, with instructions to "provide appropriate remedies" if the Board finds that there was a conspiracy (Pet. App. A, p. 24).

Amalgamated's petition for rehearing or rehearing *en banc*, which raised most of the issues presented in its petition here, was denied *per curiam* (Pet. App. B, p. 25).

[3] The remand with instructions to take the testimony of Ungar and LaVictor was not suggested by any party.

Argument

1. Petitioner does not suggest that this case is of any general importance to the public or to the administration of the Labor Act. Every other consideration aside, therefore, petitioner's failure to show that this case is worthy of the Court's attention is an incurable defect. See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74. Moreover, we have been informally advised that the N.L.R.B. will similarly oppose granting the petition, even though it was the N.L.R.B.'s order which was reversed below.

There is scant need to demonstrate that the facts of this case are *sui generis*, for in the history of the Taft-Hartley Act we have not found one other case which involves substantially parallel facts.

2. The judgment of the court below lacks finality because it merely remanded the cause to the Board to take additional testimony on the question of whether there was a conspiracy. Only if the Board finds that there was a conspiracy is the Board required to apply appropriate remedies. If the Board finds that there was no conspiracy, it would dismiss the complaint on grounds wholly unrelated to the substantive holding of the Court of Appeals, and the question decided by the court below would become moot.

As there is no showing by petitioner that interim review by this Court is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384, the Court should not exercise its discretion to review this interlocutory order under 28 U.S.C. § 1254(1).

3. The Court of Appeals *sua sponte* remanded this case to the Board with instructions to take the additional testi-

mony of Ungar and LaVictor on the question of whether there was a conspiracy, as neither of them had been called to testify before the Trial Examiner. As Briehof testified to the conspiracy, and his testimony is uncontradicted, there was no need for the Court to remand the case in this fashion. However, it had both statutory authority to do so under Section 10(e) of the Labor Act ("to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board") and inherent authority to do so. See, e.g., *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 16-17. Petitioner's tendentious argument that the court below lacked the statutory power to remand the cause for this purpose is frivolous (Pet., pp. 17-18), and petitioner's suggestion that the remand order "lies dangerously close to the Plimsoll Line of Due Process" as a matter of "double jeopardy" (Pet., p. 19) misconceives elementary principles of due process and double jeopardy.

4. Petitioner's efforts to establish some conflict between the decision of the court below and earlier decisions of this Court, of other Courts of Appeals, and of the N.L.R.B. (Pet., pp. 12-13) are spurious. Petitioner's contentions in this respect rest on a flagrant misreading of the decision below, for petitioner asserts that it "boils down to the creation of the unfair labor practice of conspiracy, *per se*" (Pet., p. 12).

The Court of Appeals did not hold that the employer's conspiracy with Amalgamated was *per se* an unfair labor practice. On the contrary, the decision means precisely what it says: Where "acts alleged to have been agreed upon in the conspiracy did occur . . . further proof of . . . the conspiracy's effectiveness is not required to establish violations of Sections 8(a)(1), (2), and (3), and 8(d)(1)(A)"

(Pet. App. A, p. 23). How can this decision be said to create a *per se* "conspiracy" doctrine? It was the conspiracy *combined* with the "acts alleged to have been agreed upon in the conspiracy" which, in the opinion of the Court of Appeals, constituted an unfair labor practice.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

S. G. Liffman
Tim L. Bornstein

1741 DeSales Street, N.W.
Washington, D. C. 20036

Robert Kaemmel

33 North LaSalle Street
Chicago, Illinois

Attorneys for Respondents Retail Clerks International Association, AFL-CIO, and Local 1111, Retail Clerks International Association, AFL-CIO

May, 1964